BEFORE THE LAND USE HEARINGS EXAMINER
FOR CLARK COUNTY, WASHINGTON

In the matter of a Type III appeal of the director's decision approving with conditions the site plan for a 22,500 sf manufacturing warehouse on 4.55 acres zoned Light Industrial (ML) in unincorporated Clark County, Washington.

FINAL ORDER

Crown Corp. Warehouse Appeal
APL2004-00024

(PSR2004-00028; SEP2004-00085)
(ARC2004-00038)

I. Summary:

This Order is the decision of the Clark County Land Use Hearings Examiner denying the appeal (APL2004-00024) and affirming with conditions the Director's site plan and related approvals (PSR2004-00028; SEP2004-00085; ARC2004-00038) for a 22,500 sf manufacturing warehouse on 4.55 acres zoned Light Industrial (ML) in unincorporated Clark County.

II. Introduction to the Property and Application:

Applicant, Appellant and Owner ..... Crown Corporation
11200 NE Gren Fels
Battle Ground, WA 98604

Contact..... Mark Stoker, Esq.
HEURLIN, POTTER, et al.
211 East McLoughlin Blvd. Suite 100
Vancouver, WA 98663

Property ..... Legal Description: Parcel number 107910 (TL 6) and 107922 (TL 4/6) located in the SE ¼ of Section 10, Township 1 North, Range 4 East of the Willamette Meridian, Street Address 6013 NE 127th Avenue

Applicable Laws..... Clark County Code (CCC) Chapters 12.05A (Transportation), 12.41 (Transportation Concurrency), 13.08A (Sewer), 13.29 (Storm Water and Erosion Control), 13.40A (Water), 13.70 (Critical Aquifer Recharge Areas), 15.12 (Fire Code), 18.317A (Industrial Districts), 18.402A (Site Plan Review), 18.600 (Procedures) and 20.50 (SEPA).

The applicant sought site plan approval for a 22,500 sf manufacturing warehouse building on a 4.55-acre industrial park site – the Viewpoint Business Park – which already has two buildings of 36,500 sf and 27,500 sf. The proposed site for the new building is currently used for outdoor storage and parking. The property abuts NE 127th Avenue on the west, by which access is obtained, and NE 59th Street on the south. The

application does not propose any new driveways, and both street frontages are fully improved.

II. The decision under appeal and the local process:

The Director issued a Type II site plan approval with conditions (Ex. 13) and a SEPA determination of nonsignificance on August 20, 2004 (PSR2004-00028). The applicant timely appealed the Director's decision (Ex. 19), objecting to Finding 5 and Condition A-2 related to the County's 20% minimum landscaping requirement in CCC Table 18.317A.040:

> Finding 5 Landscaping
> A minimum 20% of the lot area is required to be landscaped, in accordance with CCC 18.317A.080 and Table 18.317A.040. The site plan indicates that 15% of the site area is to be landscaped. The applicant claims in the application narrative that the 20% landscape coverage requirement in Table 18.317A.040 applies to the OR, OC and U zones because the table states as follows:
>
> | | |
> |---|---|
> | Minimum landscaped area/type* | 20 percent/L1 for all OR, OC, U zones |
>
> Staff rejects the applicant's interpretation of the requirement in the table, because the phrases are separated by a "/", such that "Minimum landscaped area" in the first column is associated with "20 percent" in the second column; and "type" in the first column is associated with "L1 for all OR, OC, U zones" in the second column. While, the reference to the OR, OC and U zones is curious in the context of the table as a whole, staff finds that the intent of the table is to require a standard in the industrial zones of a minimum 20% landscape coverage. The applicant's interpretation eliminates any minimum landscape coverage standard for the Industrial zones. The applicant contends that 20% is excessive and that 15% is adequate, but that contention is not supported by the code.
>
> Furthermore, this requirement has been clarified in the adoption of Title 40, where the phrase "L1 for all OR, OC, U zones" has been eliminated. Also, planning staff have consistently applied the 20% requirement in the past.
>
> Therefore, the site plan needs to be amended to provide additional landscape area (see Condition A-2).
>
> * * *
>
> **A-2** The site plan and landscape plan shall be amended to provide a minimum of 20% landscape area on the site. (see Finding 5)

The applicant's appeal raised two basic challenges to the 20% minimum landscape requirement as it was interpreted and applied by the Director. First, the applicant claimed that staff and the Director misinterpreted CCC Table 18.317A.040 in concluding that a minimum 20% landscaping was required for all development in the County's industrial zones. According to the applicant, CCC Table 18.317A.040 is ambiguous, and the 20% requirement applies only to the OR, OC and U zones. Second,

the applicant claimed that a 20% minimum landscaping requirement is disproportionate to the impact of this development and is an unconstitutional taking of private property for public purposes under *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), and *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 49 P3d 860 (2002).

The County duly noticed the Type III appeal and a November 4, 2004 public hearing before the Hearings Examiner (Exs. 20, 21 & 22). Staff issued a report on October 20, 2004 analyzing the appeal issues (Ex. 23) and recommending that the Hearings Examiner deny the appeal and uphold the Director's decision and conditions. At the commencement of the November 4, 2004 hearing, the Hearings Examiner explained the procedure and disclaimed any ex parte contacts, bias, or conflict of interest. No one objected to the proceeding, notice or procedure. No one raised any procedural objections or challenged the Examiner's ability to decide the matter impartially, or otherwise challenged the Examiner's jurisdiction.

At the hearing, the applicant/appellant's attorney, Mark Stoker, of Heurlin, Potter, et al., presented the appeal, provided an additional memorandum in support of the two arguments (Ex. 24), and a copy of the staff report for "Office/Warehouse Building" (PSR2004-00005), in which the Director supposedly did not require 20% landscaping (Ex. 26). Mike Odren, a landscape architect from Olson Engineering, also testified on behalf of the applicant/appellant.

Alan Boguslawski, County planning staff on the project, provided a verbal summary of the Director's decision and his response to the two appeal issues. Mr. Boguslawski provided a signed statement from Robert Higbie, a County Long Range Planner who worked on the minimum landscape requirements CCC 18.317A.040. Mr. Higbie states that the 20% minimum landscape requirement was intended to apply to the ML and MH industrial zones.

At the end of the November 4th hearing, the Examiner ordered that the record be kept open according to the following schedule, which was consented to by the applicants:

November 12 (1 week).....Staff's review and response
November 26 (2 weeks).....Applicant's final rebuttal (no new evidence)

Mr. Boguslawski submitted an additional memo (Ex. 27) followed by the applicant/ appellant's final rebuttal memo (Ex. 28), after which the record closed on November 24, 2004.

III. Analysis and Resolution of the Appeal Issues:

A. First Assignment of Error: The applicant/appellant asserts that CCC Table 18.317A.040 is ambiguous and its 20% minimum landscaping requirement must be interpreted to apply only to the OR, OC and U zones, and not to the industrial zones. Mr. Stoker claims that staff has been inconsistent, at best, in its interpretation of this provision, and in many if not most instances has not required 20% landscaping in previous industrial developments. Staff admitted the ambiguity of CCC Table 18.317A.040, which it attributes to a typographic error in the code (Ex. 27). Staff, however, asserted that the only logical way to interpret the table is that it applies to the

County's two industrial zones, *i.e.,* ML and MH. Staff stated that the County has required 20% minimum landscaping in many, if not most, past site plan decisions for industrially zoned land. Finally, staff rejected the applicant's interpretation, under which there would be no minimum landscape coverage requirement in the County's industrial zones – a conclusion that is clearly contrary to the obvious intent of CCC 18.317A.040 and the table.

The rules of statutory interpretation first require the examination of the regulation's text and context. If the plain language is unambiguous, that ends the analysis. If the language is ambiguous, one looks to other portions of the statute and related statutes to divine legislative intent behind the statute in question. *State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).*

The Examiner finds that CCC Table 18.317A.040 is ambiguous in some respect, but not in its minimum landscaping requirements for industrially zoned land. The table is found in the Clark County Code chapter regulating the County's two industrial zones, ML and MH, *i.e.,* CCC chapter 18.317A. It is quite clear that the Chapter and Table regulate the County's two industrial zones and purports, among other things, to impose minimum landscape coverage requirements. The table entry in question establishes the two pieces of information: minimum landscaped area and the type of landscaping. These two pieces of information are separated by a slash (/). The "minimum landscape area" requirement is "20 percent." That much about CCC Table 18.317A.040 is unambiguous.

The second piece of information, the part after the slash, is less clear. The landscaping "type" appears to be "L1," but then the confusing reference "for all OR, OC, U zones" is attached. Given that CCC Chapter 18.317A and this table regulate the County's industrial zones, this reference to three non-industrial zones does not make sense. However, the <u>type</u> of landscaping is not an appeal issue, and this ambiguity is not germane to the appeal or its resolution.

CCC Chapter 18.317A and Table 18.317A.040 regulate only the County's two industrial zones, including the ML zone, and the Table unambiguously requires a "minimum landscaped area" of 20%. Because this much of Table 18.317A.040 is unambiguous, the Examiner need not reach the applicant/appellant's various interpretations of the ambiguous part of the Table. Suffice it to say, however, that the applicant's suggestion that no minimum landscape requirement applies to the ML zone is not tenable. On this basis, the Examiner denies the applicant/appellant's first appeal argument.

B. **<u>Second Assignment of Error</u>:** The applicant/appellant's second argument is a claim predicated on its losing on the first argument, *i.e.,* if the County requires 20% of the site to be landscaped, that requirement amounts to an unconstitutional taking. The applicant/appellant refers to the *Benchmark* case, which implicates the so-called rough proportionality analysis from *Dolan v. City of Tigard, supra*. While Benchmark is popularly regarded as a takings case, its holding and resolution is based on substantial evidence. In other words, the *Benchmark* Court found that the record did not contain sufficient (substantial) evidence to support the exaction and dedication requirements at issue in that case. The evidence required, and which was lacking in the *Benchmark* case, was evidence that the city's exaction and dedication requirements were necessitated as a "direct result" of the applicant's development as required by RCW 82.02.020. The applicant/appellant in the present case does not cite the statute and

makes only a taking argument that the 20% landscaping requirement is disproportionate to the development's adverse impacts (Exs. 19, 24 & 28).

Before a taking claim can be ripe for review, the claimant must submit at least one formal development plan and pursue available local code-based relief from the development regulations claimed to be a taking. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir.), *cert denied*, 513 U.S. 870 (1994). Especially when the challenged condition is quantitative and eligible for a variance, this requires the claimant to first seek a variance before any taking claim can be deemed ripe. *Saddle Mtn. Minerals, LLC v. Joshi*, 152 Wn.2d 242, 252, 95 P.3d 1236 (2004) ("Where a land owner has not sought a variance or waiver from land use restriction, a taking claim is not ripe."). CCC chapter 18.501 allows for variances from numerical standards such as the 20% minimum landscaping requirement in Table 18.317A.040.[1] Therefore, the applicant/ appellant's failure to seek a variance from the landscaping standard before asserting a taking claim is fatal to its taking claim, at least at this stage of the proceeding, and it is denied.

IV. Decision and Conclusion:

Based on the foregoing findings, the Examiner denies the appeal (APL2004-00024) and affirms the Director's site plan, as conditioned, and the related approvals (PSR2004-00028; SEP2004-00085; ARC2004-00038) for a 22,500 sf manufacturing warehouse on 4.55 acres zoned Light Industrial (ML) in unincorporated Clark County.

Date of Decision: December, ____, 2004.

By: _____
Daniel Kearns,
Land Use Hearings Examiner

[1] CCC 18.501.005(A) explains the applicability of the variance chapter in the following terms:

> "The planning director may grant a variance to numerical standards including, but not limited to: setbacks, buffers, building height, landscaping, lot coverage, lot dimensions and parking standards, but not including lot area, density, or qualifying standards for programs such as infill or density transfer as provided in this title."

NOTE: Only the Decision and Conditions of approval, if any, are binding on the applicant, owner or subsequent developer of the subject property as a result of this Order. Other parts of the final order are explanatory, illustrative or descriptive. There may be requirements of local, state or federal law or requirements which reflect the intent of the applicant, county staff, or the Hearings Examiner, but they are not binding on the applicant as a result of this final order unless included as a condition of approval.

Notice of Appeal Rights

An appeal of any aspect of the Hearings Examiner's decision, except the SEPA determination, may be appealed to the Board of County Commissioners only by a party of record. A party of record includes the applicant and those individuals who signed the sign-in sheet or presented oral testimony at the public hearing or submitted written testimony prior to or at the public hearing on this matter.

Any appeal of the final land use decisions shall be filed with the Board of County Commissioners, 1300 Franklin Street, Vancouver, Washington, 98668 within 14 calendar days from the date the notice of final land use decision is mailed to parties of record.

Any appeal of the Land Use Hearings Examiner's final land use decision shall be in writing and contain the following:

1. The case number designated by the County and the name of the applicant;

2. The name and signature of each person or group (petitioners) and a statement showing that each petitioner is entitled to file an appeal as described under Section 18.600.100A) of the Clark County Code. If multiple parties file a single petition for review, the petition shall designated one party as the contact representative with the Development Services Manager. All contact with the Development Services Manager regarding the petition, including notice, shall be with this contact person;

3. The specific aspect(s) of the decision and/or SEPA issue being appealed, the reasons why each aspect is in error as a matter of fact or law, and the evidence relied on to prove the error;

4. If the petitioner wants to introduce new evidence in support of the appeal, the written appeal must also explain why such evidence should be considered, based on the criteria in subsection 18.600.100(D)(2); and

5. A check in the amount of $279 (made payable to the Clark County Board of County Commissioners) must accompany an appeal to the Board.